No. 82-1836

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In the Supreme Court of the United States

OCTOBER TERM, 1983

KEENE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, a defendant in more than 17,000 damages actions for asbestos exposure, may maintain an omnibus indemnity suit against the United States in admiralty when some of the 17,000 suits allege that injury occurred in land-based facilities and when neither the government's alleged misconduct nor the product triggering the suits bears a significant relationship to traditional maritime activities.

2. Whether petitioner may maintain an omnibus indemnity suit against the United States under the Federal Tort Claims Act when the administrative claim it filed pursuant to 28 U.S.C. 2675(a) does not demand a sum certain or specify the basis for the United States' liability in each of the 17,000 suits against it.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 700 F.2d 836. The opinions of the district court (Pet. App. A40-A79, A80-A87) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1983. The petition for a writ of certiorari was filed on May 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced at Pet. App. A88-A94.

STATEMENT

1. Petitioner is a defendant in more than 17,000 suits alleging personal injury or wrongful death caused by exposure to insulation products containing asbestos (Pet. 6).[1] Petitioner has settled some of the suits, and judgment has been entered in others. However, the vast majority are still pending in various courts throughout the country (Pet. App. A3 n.1). Petitioner filed the present suit in 1980, seeking to recover from the United States all damages and other costs it may incur as a result of the asbestos lawsuits, citing doctrines of indemnification, contribution, and apportionment (*id.* at A8). Petitioner invoked the Federal Tort Claims Act ("FTCA") (28 U.S.C. (& Supp. V) 1346(b) and 2671 *et seq.*), or, alternatively, the general maritime and admiralty jurisdiction of the United States (28 U.S.C. 1333), the Suits in Admiralty Act (42 U.S.C. 741 *et seq.*), the Extension of Admiralty Jurisdiction Act (46 U.S.C. 740), and the Public Vessels Act (46 U.S.C. 781 *et seq.*) (Pet. App. A4-A5).

Petitioner's amended complaint asserts that "most" of the claimants in the underlying suits were "either employees of [the United States] working in U.S. naval shipyards or employees working in private shipyards under contract to the U.S. Navy, an agency of the United States" (Pet. App. A7). According to the amended complaint, the claimants "typically" have alleged that they worked with or around thermal insulation products containing asbestos and that in the course of their work they were exposed to, and inhaled, air-borne asbestos fibers, resulting in asbestosis or other injuries (*ibid.*). The complaint states that some claimants worked in shipyards (either on shipboard or on land), while others worked in various industrial and commercial plants (*ibid.*).

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[1] Petitioner's former subsidiary was a manufacturer of thermal insulation products containing asbestos (Pet. 6 n.2).

Petitioner's amended complaint includes 23 counts purporting to sound in negligence, breach of warranty, strict liability, and unjust enrichment (Pet. App. A8). Petitioner claims that the government played the roles of a seller of asbestos fiber, a purchaser of asbestos insulation, a designer or specifier of insulation products, an employer of the claimants or their employers, an inspector of the claimants' workplace, and a promulgator and enforcer of health regulations (*id.* at A6). However, in its amended complaint petitioner makes no attempt to categorize the government's role, or the basis for government liability, in the various suits against petitioner (*id.* at A5-A6).

In 1979, before filing this suit, petitioner filed an administrative claim with several government agencies pursuant to the FTCA (Pet. App. A14-A17). See 28 U.S.C. 2675(a). In that claim petitioner generally charged the government with negligence and breach of warranty, as well as "any other theory" that would support a claim for damages, but failed to particularize the basis for government liability in each of the approximately 1,000 suits pending at that time (Pet. App. A15-A16). Petitioner claimed that the government was indebted to it for damages "in the sum of $1,088,135 and in an additional amount yet to be ascertained" (*id.* at A17). The administrative claim included a list of lead plaintiffs and docket numbers for the 1,000 pending lawsuits (*id.* at A14). The Department of Justice responded to the claim on behalf of the government agencies that had received it and requested more detailed information pursuant to 28 C.F.R. 14.4 (Pet. App. A58-A59). Petitioner did not provide the requested information, but instead filed this lawsuit (*id.* at A59). The government sought dismissal of the suit for lack of subject matter jurisdiction under the FTCA and under the various admiralty statutes cited by petitioner.

2. The United States District Court for the Southern District of New York granted the government's motion to dismiss (Pet. App. A40-A79). It ruled: (1) that petitioner's suit was not a third-party action and therefore was not exempt from the administrative claim requirement under 28 U.S.C. 2675(a) (Pet. App. A45-A51); (2) that petitioner's administrative claim did not provide a sufficient basis for FTCA jurisdiction, because it did not demand a specific sum or provide enough information to permit an assessment of government liability in each underlying suit (*id.* at A51-A61); (3) that under *Executive Jet Aviation, Inc.* v. *City of Cleveland,* 409 U.S. 249 (1972), petitioner's suit did not lie in admiralty, because for some of the claims the underlying conduct did not occur on navigable waters and because the remaining claims lacked a significant nexus with traditional maritime activity (Pet. App. A61-A71); and (4) that under the Federal Employees' Compensation Act, 5 U.S.C. 8116(c), petitioner could not seek indemnity from the United States based on suits by federal employees (Pet. App. A71-A77).[2]

The district court concluded that petitioner's suit should be dismissed because it "has attempted to do too much at one time, with too little jurisdiction" (Pet. App. A78-A79). On petitioner's motion for reconsideration, the district court declined (*id.* at A80-A87) to follow two then-recent decisions in which the Fourth Circuit had indicated that admiralty jurisdiction may lie in certain asbestos suits, *White* v. *Johns-Manville Corp.,* 662 F.2d 234 (1981), cert. denied, 454 U.S. 1163 (1982), and *Glover* v. *Johns-Manville Corp.,* 662 F.2d 225 (1981).

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[2]This Court recently reached a different result on the Federal Employees' Compensation Act issue. See *Lockheed Aircraft Corp.* v. *United States,* No. 81-1181 (Feb. 23, 1983). That issue is not raised by the petition in this case.

3. The court of appeals affirmed (Pet. App. A1-A29), primarily for the reasons stated in the district court's opinion (*id.* at A12). The court of appeals noted initially that the administrative claim requirement of the FTCA is jurisdictional and cannot be waived (*id.* at A17). "Since [petitioner] has filed no Notice of Claim regarding the vast majority of the suits against it, it is clear that no jurisdiction exists under the FTCA as to these claims" (*id.* at A18) (footnote omitted).[3] The court concluded that the claim that had been filed as to some of the suits did not satisfy the purpose of the administrative claim requirement, which is to allow the government to investigate, evaluate and consider settlement of a claim (*id.* at A21). The court of appeals held that "a claim which includes 'an additional amount yet to be determined,' which may dwarf the sum stated, is a request for damages so indefinite as to fail to satisfy the statutory purpose" (*id.* at A21), and that the generality of petitioner's administrative claim (which the court characterized as a "laundry list of potential variables") "makes it impossible * * * to evaluate * * * the exposure of the government * * *" (*id.* at A23-A24). Finally, the court of appeals agreed with the district court that petitioner's suit was an "original" action, and therefore not in the nature of a third party complaint exempt from the administrative claim requirement (*id.* at A25-A26). See 28 U.S.C. 2675(a).

In considering petitioner's alternate claim of admiralty jurisdiction, the court of appeals applied the two-pronged

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[3]At the district court level, petitioner's action involved approximately 6,000 underlying suits (Pet. App. A41). By the time the court of appeals considered the case, more than 14,000 underlying suits had been filed against petitioner (*id.* at A3). The number now has grown to more than 17,000 suits (Pet. 6). Petitioner's administrative claim, filed in 1979, covered only about 1,000 of the underlying suits (Pet. App. A3 n.1). After beginning this litigation, petitioner filed another administrative claim covering approximately 3,800 of the underlying suits (*id.* at A14 n.6).

test established by this Court in *Executive Jet Aviation, Inc.* v. *City of Cleveland, supra* — whether the wrong took place on navigable waters ("situs") and whether it bears a significant relationship to traditional maritime activity ("status") (Pet. App. A28-A29). The court of appeals concluded that petitioner's suit does not satisfy the "situs" test, because some of the workers who had sued petitioner "were exposed to asbestos in power plants, refineries, and other land-based commercial facilities, and even if the other workers were exposed to asbestos in a maritime situs * * *, it is impossible to determine which of the underlying actions would be properly heard in admiralty, and which not, without a case by case evaluation" (*id.* at A30-A31).

The court of appeals also held that petitioner's suit did not satisfy the "status" test for admiralty jurisdiction. The court stated (Pet. App. A32-A33):

> First, [petitioner] does not allege that its insulation was designed specifically for maritime use. * * * Second, many of the roles attributed to the government and allegedly giving rise to [petitioner's] cause of action —the government's sale of asbestos to [petitioner], its specification of asbestos as a component of insulation it purchased from [petitioner], its alleged breach of its duty to inspect the work place, its obligations as a promulgator of health regulations — do not bear a significant relationship to traditional maritime activities such as "navigation and commerce."

In reaching this conclusion the court of appeals expressly declined (*id.* at A35-A36) to follow the reasoning of the Fourth Circuit in *White* v. *Johns-Manville Corp., supra,* and *Glover* v. *Johns-Manville Corp., supra,* and the reasoning of the Fifth Circuit in *Sperry Rand Corp.* v. *Radio Corp. of America,* 618 F.2d 319 (1980).

ARGUMENT

The court of appeals' comprehensive decision is correct and does not warrant review by this Court.

1. Petitioner contends (Pet. 17-25) that review is warranted because there is a conflict among the circuits that have considered the application of admiralty jurisdiction to claims of injury caused by exposure to products containing asbestos in shipyards and on navigable waters. But petitioner cites only one court of appeals decision, *White* v. *Johns-Manville Corp., supra,* that permits an admiralty suit for exposure to a product containing asbestos.[4] In *White,* the Fourth Circuit relied on this Court's *Executive Jet* test for admiralty jurisdiction, under which a maritime situs and a significant relationship to traditional maritime activity are required (409 U.S. at 268). See also *Foremost Insurance Co.* v. *Richardson,* No. 80-2134 (June 23, 1982). The court in *White* stressed that the evidence at trial in that case clearly established that the materials used by the five appellant shipyard workers during repair and construction of ships "were designed, advertised and marketed as maritime asbestos products." 662 F.2d at 240.

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[4]The other two cases petitioner cites (Pet. 22-23) in support of admiralty jurisdiction for asbestos suits, *Sperry Rand Corp.* v. *Radio Corp. of America, supra,* and *Glover* v. *Johns-Manville Corp., supra,* do not conflict with this case. *Sperry Rand* did not involve asbestos at all; instead, it involved a product liability suit against the manufacturer of a component of a marine gyro-pilot steering system that allegedly caused a maritime collision. *Glover* did involve asbestos, but did not resolve the admiralty jurisdiction issue. See 662 F.2d at 229 n.4.

Petitioner also cites *White* v. *Johns-Manville Corp.,* 662 F.2d 243 (4th Cir. 1981), referred to as "*White II.*" However, the decision in that case, which involved third-party indemnity claims, merely applied the finding of admiralty jurisdiction in the companion case of *White* v. *Johns-Manville Corp.,* 662 F.2d 234 (4th Cir. 1981), discussed in the text.

The court of appeals in the decision below (Pet. App. A35) and two other courts of appeals (see *Austin* v. *Unarco Industries, Inc.*, 705 F.2d 1, 9 (1st Cir. 1983), petition for cert. pending, No. 82-2164 (filed June 28, 1983), and *Owens-Illinois, Inc.* v. *United States District Court*, 698 F.2d 967, 971 (9th Cir. 1983)) have disagreed with *White* on the question whether shipyard workers' asbestos injuries satisfy the *Executive Jet* requirement of a significant relationship to traditional maritime activity. But unlike *White* none of these cases appears to have involved clear evidence that asbestos materials were designed, advertised and marketed as maritime products. Indeed, the court of appeals here found an absence of significant relationship to traditional maritime activity because petitioner "does not allege that its insulation was designed specifically for maritime use" (Pet. App. A32). Moreover, petitioner's claims, unlike those in *White* and the other asbestos cases, involve allegations that the United States played several distinct roles, including some that are decidedly non-maritime — for example, its role as inspector or safety regulator. See Pet. App. A32-A33. Because of the important factual distinctions between this case and *White*, they do not establish a true conflict on the "significant relationship" issue.[5]

In any event, the court of appeals correctly decided (Pet. App. A30-A31) that petitioner's suit did not even satisfy the threshold maritime situs test under *Executive Jet*. Petitioner concedes in its complaint that some of the underlying asbestos suits arise from injuries suffered in power plants, refineries, and other land-based commercial facilities (Pet.

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[5]Indeed, the decision below and the cases cited by petitioner make clear that application of the test for admiralty jurisdiction in asbestos cases depends largely on case by case evaluation of jurisdictional facts. Moreover, the court of appeals cases that petitioner cites as in conflict with the decision below do not involve claims against the government for contribution or indemnity.

App. A30). It has made no effort to separate suits with a maritime locality from land-based suits.[6] Because admiralty jurisdiction lies only where the "injury * * * occur[s] on navigable waters" (*Austin* v. *Unarco Industries, Inc., supra,* 705 F.2d at 9), petitioner's failure to specify the maritime locality of the thousands of suits pending against it precludes admiralty jurisdiction. Thus, even if there were a true conflict among the circuits on the "significant relationship" issue, this case would not be an appropriate vehicle for resolution of the conflict.

The fundamental flaw in petitioner's suit is its attempt to consolidate thousands of very different lawsuits into one without attempting to classify or otherwise describe the individual suits. A court cannot determine whether or not admiralty jurisdiction exists without a case-by-case evaluation of parties, claims, and legal theories. Petitioner has declined to provide sufficient information to permit such a determination. Thus, the courts below correctly concluded that petitioner's claims based on admiralty jurisdiction must be dismissed.

2. Petitioner's alternative invocation of FTCA jurisdiction also suffers from its attempt to consolidate too many diverse suits.[7] The courts below correctly concluded that petitioner's omnibus action seeking indemnity in 17,000 underlying suits cannot be maintained because petitioner has failed to satisfy the administrative claim prerequisite to FTCA jurisdiction. See 28 U.S.C. 2675(a).

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[6]The concurring opinion in *White* v. *Johns-Manville Corp., supra,* 662 F.2d at 241-242, noted that the appellant shipyard workers in that case had alleged that between 90 and 97% of their exposure to asbestos occurred on navigable waters and that this allegation had not been contested. Petitioner has not made any similar specific allegations.

[7]FTCA jurisdiction and admiralty jurisdiction are mutually exclusive. See 28 U.S.C. 2680(d); Pet. App. A28 n.11.

Section 2675(a) prohibits FTCA suits "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency * * *." Congress required preliminary administrative presentation of a claim in order to "permit a government agency to evaluate and settle the claim at an early stage, both for the possibility of financial economy and for the sake of relieving the judicial burden of FTCA suits * * *." *Swift* v. *United States*, 614 F.2d 812, 814 (1st Cir. 1980), quoting *Kornbluth* v. *Savannah*, 398 F. Supp. 1266, 1268 (E.D.N.Y. 1975). In light of this congressional purpose, every court that has considered the administrative claim requirement of Section 2675(a) has concluded that, at a minimum, a claimant must provide notice of accident and injury and a claim for a "sum certain." *Avery* v. *United States*, 680 F.2d 608, 610 (9th Cir. 1982). Accord, *Douglas* v. *United States*, 658 F.2d 445, 447-449 (6th Cir. 1981); *Lunsford* v. *United States*, 570 F.2d 221, 224-227 (8th Cir. 1977).

Despite these established requirements, petitioner filed an administrative claim that (1) failed to provide notice of the particular claim and injury in each of the suits against petitioner, and (2) did not seek a sum certain, but instead sought "$1,088,135 and * * * an additional amount yet to be ascertained" (Pet. App. A17). Indeed, petitioner filed no administrative claim at all for the great majority of the 17,000 suits that by now have been filed against it. See note 3, *supra*. In these circumstances, the court of appeals correctly concluded (Pet. App. A21-A24) that petitioner had given the United States no realistic opportunity to evaluate its exposure or settle petitioner's indemnity suit, as required by 28 U.S.C. 2675(a).

Petitioner suggests (Pet. 25-29) that there is a conflict among the circuits with respect to whether Department of Justice regulations requiring a detailed notice of claim (28

C.F.R. 14.1 *et seq.*) are binding in a jurisdictional sense. Compare, *e.g., Lunsford* v. *United States, supra,* 570 F.2d at 223-227 (compliance with regulations is jurisdictional), with *Avery* v. *United States, supra,* 680 F.2d at 610-611 (compliance is not jurisdictional). The court of appeals found it unnecessary to decide this issue (Pet. App. A21 n.9), and it is therefore not properly raised in this Court. Moreover, even the circuits that have concluded that the Justice Department regulations are not jurisdictional nevertheless require under Section 2675(a) a "skeletal claim form, containing * * * the bare elements of notice of accident and injury and a sum certain representing damages * * *." *Avery* v. *United States, supra,* 680 F.2d at 610. Petitioner has not even come close to satisfying that modest and undisputed statutory requirement.

Petitioner contends (Pet. 32) that its omnibus administrative claim was sufficient because "the Government * * * is fully aware of the facts and allegations underlying [petitioner's] claim." Even if this contention were correct, it would not compensate for the inadequacy of petitioner's administrative claim, because, as noted above, a proper claim is a statutory prerequisite to suit. In any event, petitioner's contention is not correct. Although the government is aware in a general sense of asbestos litigation and issues, it has no way of evaluating its possible liability for indemnity in each of the 17,000 different suits against petitioner.

Petitioner has provided no basis on which the United States (or a court) conceivably could consider possible liability and damages. Although petitioner's desire to simplify its litigation burden is understandable, its effort to do so by pursuing a single omnibus indemnity suit to cover 17,000 underlying actions would, as the court of appeals concluded (Pet. App. A39), "do violence to established processes of the judicial system and well established principles relating to the FTCA and admiralty jurisdiction."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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